

**SUPREME COURT OF NIGERIA**  
FRIDAY 1ST JULY, 2016. SC. 457/2012  
**CORAM:- I. T. MUHAMMAD, N. S. NGWUTA,**  
**K. B. AKA'AH, C. C. NWEZE, A. SANUSI, JJSC**

ONYEDIKACHI OSUAGWU ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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ARMED ROBBERY - Proof of - Ingredients - Prosecution must establish ingredients of the offence beyond reasonable doubt - Otherwise there will not be guilty verdict from court (H1)

IDENTIFICATION PARADE - Conduct - Manner of - Police must assemble group of persons of common physical features - From whom witness is required to identify the suspect unaided (H2)

IDENTIFICATION PARADE - Conduct - Failure in - Effect - Where the exercise is poor - Trial court should return verdict of not guilty - Save there is another evidence showing correctness of the exercise (H3)

CRIMINAL PROCEDURE - Proof - Number of witness - Prosecution need not call all the witnesses to prove its case - As the choice of witnesses is at its discretion (H4)

EVIDENCE - Withholding of - Effect - As prosecution failed to call the IPO to clear doubts in the matter - It is presumed that such evidence would have been favourable to accused (H5)

ALIBI - Defence - Failure to investigate - As appellant's defence of alibi was not investigated - He is entitled to an acquittal and not the conviction handed on him by trial court (H6)

CRIMINAL PROCEDURE - Proof - Burden of - Is on prosecution throughout and would not shift to an accused - Who makes and relies on his no case submission - Save circumstances such as where accused raises defence of insanity (H7)

### **FACTS**

Accused/appellant was along with three others, arraigned before the High Court of Imo State, Ahiazu Mbaise Judicial Division, for the offences of conspiracy to commit armed robbery and armed robbery contrary to sections 516 and 402(2)(a) of the Criminal Code Cap. 77 LFN 1990, respectively. They pleaded not guilty to the charges and trial commenced. Appellant's defence of alibi upon his arrest was neither investigated nor considered by the Court during the trial. To support its case, prosecution/respondent called five witnesses and tendered certain documents.

At the end of the case of respondent, appellant through his learned counsel entered and relied on a no case submission. At the conclusion of trial, the Court overruled the said submission, convicted and sentenced appellant to death upon finding him guilty as charged. Aggrieved, appellant appealed to the Court of Appeal Owerri Division. The Court dismissed the appeal and affirmed the judgment of the trial Court. Aggrieved further, appellant has appealed to the Supreme Court, contending that the essential ingredients of the offences were not established by respondent.

### **ISSUE FOR DETERMINATION**

*"Whether the Prosecution proved its case against the appellant as charged?"*

**HELD** (Unanimously allowing the appeal per **NWEZE JSC**)

*ARMED ROBBERY - Proof - Ingredients*

**1. In order, therefore to secure the conviction of an accused person for the offence of armed robbery, the prosecution must satisfy the requirements of these ingredients beyond reasonable doubt. Where this is not done, the case must fail. Put, differently, it is the prosecution's proof of these ingredients beyond reasonable doubt that would warrant a guilty verdict from the court of trial. In effect, the Prosecution failed to prove one of the essential ingredients of the said offence. This failure meant that a doubt was created in the prosecution's case: a doubt that should**

**have eventuated to the acquittal and discharge of the appellant.**

**It cannot be gainsaid that were the prosecution fails to establish all the essential ingredients of the offence charged beyond reasonable doubt, its case would collapse like a part of cards.** (pp. 3448 D/3455 C)

*IDENTIFICATION PARADE - Conduct - Manner of*

**2. I am, therefore, constrained to restate the well-known position that, for such an exercise to constitute an identification parade, the Police must assemble a group of persons of identical size and common physical features from whom a witness would, then, be required to identify a suspect or suspects unaided and untutored.**

**To qualify as an Identification parade, what transpired there must be the identification evidence of a witness who was either the victim of the armed robbery attack or of a witness who was an eye witness to the armed robbery operation. In other words, it must be that evidence which tends to show that the person charged with that offence is the same as the person who was seen by the witness, as committing the said offence.** (pp. 3451 G/3454 B)

*IDENTIFICATION PARADE - Conduct - Failure in - Effect*

**3. As already pointed above, it is a settled principle, under our criminal justice system, that where an identification evidence is poor, as in the instant case, the trial court should return a verdict of not guilty unless there is another evidence which goes to show the correctness of such an identification.** (p. 3454 H)

*CRIMINAL PROCEDURE - Proof - Number of witness*

**4. Counsel for the respondent contended that, since the Prosecution called a total of five witnesses, there was no need calling the Investigating Police Officer [IPO]. True, indeed, It has long been established that the Prosecution need not call all the witnesses to prove its case, and in fact, the choice of witnesses is at its discretion.** (p. 3455 F)

*EVIDENCE - Withholding of - Effect*

**5. What is more, from the evidence elicited from the said PW2 in cross examination, it is not in doubt that the circumstances of the so-called identification parade were twined in some doubts. As such, the evidence of the IPO [who, presumably, arrested the appellant and, purportedly, conducted the contested identification parade] was very vital as regards the circumstances of the appellant's arrest and the nature of the said identification parade.**

**Since the prosecution failed to call him as a witness to clear the doubts that engulfed these incidents, the presumption is that his evidence would have been more favourable to the accused person. (p. 3456 A)**

*ALIBI - Defence - Failure to investigate*

**6. There is another feature of the judgments of the lower courts which, invariably, incommoded the constitutional presumption in favour of the appellant. As the appellant's counsel pointed out [paragraph 3. 21, page 7 of the brief], the appellant's defence of *alibi*, which he raised at the earliest opportunity on December 18, 2005, was not considered at all. Worse still, the Police would seem not to have investigated it all.**

**These two missteps epitomized the failure of justice or the misapplication of justice. On the one hand, having raised the said defence of *alibi* at the earliest opportunity. In his said statement, the appellant had availed the Prosecution of the opportunity either to confirm or confute its availability to him.**

**In other words, he cast a burden on the Prosecution to investigate it.**

**As the said defence was not investigated, he was entitled to an acquittal, and not the conviction which the trial court slammed against him.**

**On the other hand, I, entirely, endorse the submission of the appellant's counsel that, no matter how flimsy that defence was, the lower courts ought to have considered it.**

**In effect, the trial court's verdict, affirmed by the lower court, amounted to a miscarriage of justice as it was, wholly,**

***prejudicial to the appellant's substantive right.***

***That would, thus, be a ground for interfering with the concurrent findings of the lower courts.*** (p. 3458 E)

*CRIMINAL PROCEDURE - Proof - Burden of*

***7. The lower court made heavy weather of the fact that the appellant did not testify but opted to make a No Case submission. This is non-sequitur. Unarguably, the prosecution may still fail if the accused person does not utter a word in his defence if the ingredients of the offence are not proved beyond reasonable doubt.*** B C

***This is an offshoot of the prescription that in criminal cases, the burden of proof remains on the prosecution throughout and does not shift to the accused person, except in a few limited circumstances, such as where an accused person raises a defence of insanity.*** D (p. 3459 G)

### **REPRESENTATION**

Ikhide Ehighelua for the Appellant

C.N. Akowundu for the Respondant

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### **CASES REFERRED TO**

Abacha v. State [2002] 11 NWLR (pt. 779) 437

Egbe v. State [1980] 1 NCR

Okoli v. State [1992] 6 NWLR (pt. 247) 381

Enuma v. State [1997] 1 NWLR (pt. 479) 115

Nwankwoala v. State [2006] All FWLR (pt. 339) 801

Eke v. State [2011] 3 NWLR (pt. 1235) 589

Ulebaka v. State [2011] 4 NWLR (pt. 1237) 358

Bozin v. State [1985] 2 NWLR (pt. 8) 465

Kalu v. State [2011] 4 NWLR (pt. 1238) 429

State v. Aibangee [1988] 3 NWLR (pt. 84) 548

Ojukwu v. State [2002] FWLR (pt. 98) 943

Omogodo v. State [1981] NSCC 119

Opeyimi v. State [1985] 2 NWLR (pt. 5) 101

Aituma v State [2006] 10 NWLR (pt. 989) 452

Osuoha v. State [2010] 16 NWLR (pt. 1219) 364

Ugwumba v. The State (1993) 7 KLR 190

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**STATUTE REFERRED TO**

Criminal Code Act Cap. 77 LFN 1990, ss. 402(2)(a), 516

**B                                    LEAD JUDGMENT BY NWEZE JSC**

The appellant in this appeal and three other persons were arraigned at the High Court of Imo State, Ahiazu Mbaise Judicial Division, on information in which they were charged with the following:

**COUNT 1**

**C                                    STATEMENT OF OFFENCE**

Conspiracy contrary to Section 516 of the Criminal Code Act Cap. 77 LF (sic) 1990 applicable to Imo State;

**PARTICULARS OF OFFENCE**

**D** Onyedikachi Osuagwu, Chimezie Ogu, Michael Anyanwu and Chibuike Samuel Ibe on the 15th day of December, 2005, at Umuduruji Elekenaowari Obohia Ahiazu, Mbaise in the Aboh, Mbaise Judicial Division, conspired among yourselves to rob with guns one *Cosmas Azodiro* of the sum of N1 , 827, 000 (One Million, Eight  
**E** Hundred and Twenty Seven Thousand Naira) belonging to him.

**COUNT 2**

**STATEMENT OF OFFENCE**

Armed Robbery, contrary to Section 402 (2) (a) of the Criminal Code Act, Cap. 77, Laws of the Federation, 1990, as applicable

**F** to Imo State

**PARTICULARS OF OFFENCE**

**G** Onyedikachi Osuagwu, Chimezie Ogu, Michael Anyanwu and Chibuike Samuel Ibe on the 15th day of December, 2005 at Umuduruji Elekenaowari Obohia Ahiazu Mbaise in the Aboh Mbaise Judicial Division, *armed with short guns robbed one Cosmas Azodiro of the sum of N1, 827, 000 (One Million Eight Hundred and Twenty Seven Thousand Naira) belonging to him* [Italics supplied for emphasis]

**H** Sequel to their plea of “Not guilty” on June 4, 2008, trial commenced. In proof of their case, the Prosecution called five witnesses. The court (hereinafter, simply, referred to as “the trial court”), also, admitted certain documents as exhibits, A; B; C; D; E; F and G. At the end of the case of the Prosecution, counsel for the appellant

entered and relied on his No Case submission.

In its judgment of September 23, 2009, the trial court (Coram Duroha-Igwe J.), overruled the said submission, convicted and proceeded to sentence him to death upon finding him guilty “as charged.”

Dissatisfied with the outcome of his trial, he appealed to the Court of Appeal, Owerri Division (hereinafter referred to as “the lower court”) which court affirmed the judgement of the trial court. This further appeal to this court is the appellant’s expression of his disgust with the judgement of the lower court. He formulated four issues for the resolution of his grouse against the said judgement. These issues were framed thus:

1. Whether the court below was right to have affirmed the death sentence imposed by the trial court on the appellant in the circumstances of this case?

2. Whether the court below was right in holding that the appellant was properly identified as one of the Robbers?

3. Whether the court below was right in upholding the decision of the trial court dismissing the No Case Submission of the appellant before the trial court?

4. Whether the court below was right in affirming the death sentence imposed on the appellant by the trial court in the absence of the evidence of the Investigating Police Officer?

For the respondent, five issues were raised for the determination of the questions in this appeal. Having regard to the cogency of the questions in the appellant’s issues apropos his main complaints in the Notice and Grounds of Appeal, his issues would be adopted in the determination of this appeal.

However, it cannot be gainsaid that, from his said complaints, his grouse against the judgment of the lower court could be subsumed under one commodious issue, namely, “*Whether the Prosecution proved its case against the appellant as charged?*” This appeal would, therefore, be determined on the template of the contours of this issue.

For the avoidance of doubt, therefore, I have taken the liberty to condense the appellant’s issues into one broad issue which I have proceeded to re-frame thus:

Whether the Prosecution proved its case against the appellant as charged?

## ARGUMENTS OF THE APPELLANTS

When this appeal was heard on April 21, 2016, Ikhide Ehiguelua, counsel for the appellant, adopted the brief filed on November 8, 2012. In it, he impeached the judgment of the lower court on five main planks. In the first place, he canvassed the impossibility of the consummation of the offence of armed robbery in the absence of its victim. In his view, since the PW1 was not anywhere near the alleged *locus criminis*, and neither saw the alleged robbers nor did they threaten him with violence, he could not have been robbed on December 15, 2005, citing pages 60 -64 of the record.

He contended that, where the Prosecution's evidence at the trial runs contrary to the charge preferred against an accused person, he would be entitled to an acquittal and discharge, *Abacha v State* [2002] 11 NWLR (pt 779) 437; [2002] 7 SC (pt 1) 1; *Egbe v The State* [1980] 1 NCR, ALR 341; *Okoli v State* [1992] 6 NWLR (pt 247) 381; *Enuma v State* [1997] 1 NWLR (pt 479) 115.

He pointed out that though the appellant, in his statement of December 18, 2005 at pages 18 -19 of the record, maintained that he knew nothing about the alleged robbery and indicated that he was in the house of one Chikodi on December 15, 2005, that claim was neither investigated by the Police nor was it considered at all by the court.

This, in his submission, was a wrong approach since an accused person's defence must be considered no matter how flimsy, *Nwankwoala v State* [2006] All FWLR (pt 339) 801; *Eke v State* [2011] 3 NWLR (pt 1235) 589; *Ulebaka v State* [2011] 4 NWLR (pt 1237) 358.

Counsel drew attention to the fact that, though the PW1 was well-acquainted with Chibuike Ibe, the fourth accused person, he, consistently, referred to him as the first accused person, page 62 of the record, whereas it was the appellant who was the first accused person.

On the question of the identity of the alleged robbers, he referred to the testimony of PW2 [the only eye witness of the alleged robbery incident] who conceded that she did not know the appellant prior to the incident and that the operation lasted for twenty minutes only. He pointed out that there was no identification parade thereafter.



He observed that, whereas the appellant's statement at page 18 of the record was recorded on December 18, 2005, three days after the alleged robbery, the PW2's statement, titled "Second Statement of the PW2" on page 9 of the record, which she volunteered at the State CID, was made on December 21, 2005, long after the appellant had been detained in Police custody. B

Worse still, in the said statement of December 21, 2005, the PW2 neither identified the appellant nor anybody in the Police station to be among the robbers. Counsel pointed out that the Police Investigation Reports at pages 10 -17 of the record did not suggest that any suspect was paraded and identified by the PW2. He maintained, therefore, that, at the earliest opportunity, the PW2 did not mention any of the alleged robbers. Worse still she did not identify the appellant as one of the robbers, *Bozin v The State* [1985] 2 NWLR (pt 8) 465. C

He insisted that the only thing that tended to point to the identification parade was the answers elicited from the PW2 in cross examination during the trial almost three years after the alleged robbery. In his view, since the appellant was not arrested at the scene of the crime, the Prosecution should have led evidence which must identify him to be among the robbers on December 15, 2005. D

On the contrary, he observed, the Police brought out the four accused persons and asked the PW2 to identify the robbers. He faulted the conclusion of the lower court to the effect that "the identification of the appellant at the State CID, Owerri *satisfied or, at least, substantially satisfied the requirements of the law*, [italics supplied by counsel]. E

In his submission, there was no identification parade known to law, *Kalu v The State* [2011] 4 NWLR (pt 1238) 429, 460 - 461; *Bozin v The State* [1985] 2 NWLR (pt 8) 465; *State v Aibangee* [1988] 3 NWLR (pt 84) 548; *Ojukwu v The State* [2002] FWLR (pt 98) 943. He explained that only four accused persons were shown to the PW2 at the State CID, Owerri, citing the lower court's findings [paragraph 4.26, page 15 of the Appellant's brief. F

Next, Counsel canvassed the view that the lower court, wrongly, endorsed the trial court's dismissal of the appellant's No case submission. He, finally, submitted that the lower court was wrong in affirming the death sentence which the trial court imposed on the appel- G H

lant. He advanced the following reasons.

The Investigation Police Officer at the State CID, who showed the accused persons to the PW2 for identification if they were the alleged robbers, was not called to testify at the trial: an omission which, in his submission, was fatal to the Prosecution's case, *Omogodo v B The State* [1981] NSCC 119.

He maintained that the evidence of the said IPO, who arrested the appellant outside the scene of the crime, and in circumstances unconnected with the complainant's complaint, and presented him to the PW2 for identification as one of the robbers, was, absolutely, vital in the resolution of the identification conundrum. As such, the omission to call the said IPO was fatal to the Prosecution's case, *Opeyimi v The State* [1985] 2 NWLR (pt 5) 101; *Aituma v State* [2006] 10 NWLR (pt 989) 452; *Osuoha v The State* [2010] 16 NWLR (pt 1219) 364; *C. O. P. V Ude* [2011] 12 NWLR (pt 1260) 189.

He inveighed against the lower court's conclusion that the testimony of the PW5 obviated the need for the IPO's evidence. He explained that the PW5 never met with the appellant in the course of his investigation, citing exhibit G [page 27, paragraph 6. 10 ii and iii]. He impugned the conclusion of the lower court which, notwithstanding its finding that the trial court was hasty in foreclosing the case of the Prosecution, still proceeded to affirm the conviction, a product of the said hasty trial. He urged the court to hold that the failure to call the IPO was fatal to the Prosecution's case as it cast serious doubt on its case: a doubt which ought to be resolved in the appellant's favour.

**RESPONDENT'S SUBMISSIONS**

On his part, S. A. Njoku, for the respondent, adopted the brief settled by C. N. Akowundu and filed on February 4, 2013, although deemed, properly, filed on November 13, 2013. In the said brief, he, first, took on the issue of the proper identification of the alleged robbers, [paragraphs 003 -035, pages 6 -15 of the brief], citing page 65 of the record, *Archibong v The State* [2006] All FWLR (pt 323) 1747, 1762.

In his submission, the trial court critically evaluated the evidence of the Prosecution's witnesses and concluded that the appellant was, properly identified as one of the robbers, citing pages 104, 67 and 107 of the record and the lower court's affirmation of the findings of the trial court in this regard, pages 192 -200 of the record.

He maintained that the lower courts, rightly, applied the principle enunciated in *Okosi v The State* [1998] 1 ACLR 281, 295. He cited a host of other cases on the point, para. 027, page 13 of the brief.

Still on the evidence of identification, in relation to the third ingredient of the offence in question, he contended that the appellant not only took part in the robbery incident but played a significant role in it, citing page 96 of the record. He noted that, since the lower courts made concurrent findings on the question of the identification of the appellant, the Prosecution proved its case as required by law, *Akpan v The State* [1992] 6 NWLR (pt 248) 439, 460 - 461; *Ehot v State* [1993] 4 NWLR (pt 290) 663. C

He disagreed with the suggestion that the Prosecution's case was riddled with contradictions, citing page 62 of the record. He canvassed the view that, having called five witnesses the Prosecution did not need to call the IPO, citing page 206 of the record for the view of the lower court; *Udo v The State* [2006] All FWLR (pt 337) 456, 467; *Egbeyom v The State* [2000] 4 NWLR (pt. 654) 559; *Akinyemi v The State* [1999] 6 NWLR (pt 607) 449, 461. He contended that the offence of armed robbery does not require any corroboration, citing section 200, Evidence Act, 2011; *Okoro v The State* [1998] 14 E NWLR (pt 584) 181, 216. D

He conceded that the Prosecution had a duty to prove its case beyond reasonable doubt even when an accused person chose to remain silent, *Igabela v State* [2006] 6 NWLR (pt 975) 100; *Okoro v The State* [1988] 5 NWLR (pt 94) 255; *Ahmed v The Nigerian Army* [2011] 1 NWLR (pt 1227) 89, 18. He argued, however, that in such a situation, that is, where an accused person opted to remain silent, if the Prosecution still, adequately, discharged the burden of proving the case against him beyond reasonable doubt, he would have himself to blame, *Utteh v The State* [1992] 2 NWLR (pt 223) 257 - 274. In his view, the Prosecution discharged its burden in the instant case. F  
RESOLUTION OF THE ISSUE G

As indicated at the outset of this judgement, the appellant and others were charged with the offences of conspiracy and armed robbery against the person of Cosmas Azodiro, that is, PW1, in the proceedings at the lower court. While the trial court found the appellant guilty with respect to the two counts, it, only, convicted and sentenced him for the offence of armed robbery. In this appeal, the H

appellant is interrogating the lower court's affirmation of the trial court's conclusion that Prosecution proved its case beyond reasonable doubt.

**INGREDIENTS OF THE OFFENCE**

It is no longer in doubt that Case Law has identified these constitutive ingredients of the offence of armed robbery, namely, that

B there was a robbery or series of robberies; that the robbers were armed and that the accused persons committed the said offence, *Suberu v The State* [2010] 8 NWLR (pt 1197) 586; *Nwachukwu v The State* [1985] 1 NWLR (pt 110) 218; *Alabi v The State* [1993] 7 NWLR (pt 307) 551; *Olayinka v The State* [2007] 9 NWLR (pt 1040) 561; *Bozin v State* (1985) 2 NWLR (pt 8) 465, 467; *Okosun v AG, Bendel State* (1985) 3 NWLR (pt 12) 283; *Ikemson v State* (1989) 3 NWLR (pt 1100) 455; *Adeosun v State* (2007) 46 WRN 1; *Afolalu v The State* [2010] 16 NWLR (pt 1220) 554; *Amina v The State* [1990] D 6 NWLR (pt 155) 125; *Okosi v. AG, Bendel State* [1989] 1 NWLR (pt 100) 642.

***In order, therefore to secure the conviction of an accused person for the offence of armed robbery, the prosecution must satisfy the requirements of these ingredients beyond***

E ***reasonable doubt. Where this is not done, the case must fail. Put, differently, it is the prosecution's proof of these ingredients beyond reasonable doubt that would warrant a guilty verdict from the court of trial, Afolalu v The State*** (supra); *The State v Isiaku* (2013) LPELR -20521 (SC); *Bozin v State* (supra) at 467;

F *Alabi v State* (supra); *Olayinka v State* [2007] 9 NWLR (pt.1040) 561; *Osetola and Anor v The State* [2012] 17 NWLR (pt 1329) 251, 275.

#### JUDGMENT OF THE LOWER COURT

G In finding the appellant guilty of the said offence, the trial court held that the "*Prosecution has proved their case beyond reasonable doubt against [the] first; third and fourth accused persons... I find [them] guilty as charged...*" [page 111 of the record]. In affirming the above conclusion, the lower court, first, posited thus:

H "The offence of armed robbery is one which upon conviction carries the ultimate punishment, which is death or the taking of life. In that respect, *a trial court hearing such a case must exercise utmost judicial caution before convicting on it. A trial court should therefore not convict thereon until all the ingredients of the offence have been*

*properly and clearly proved beyond reasonable doubt. Where any of the ingredients is found not to have been proved, the accused will be entitled to an acquittal...*”[Per Tsamani JCA at pages 197 -198 of the record; italics supplied for emphasis]

On the proof of the constitutive ingredients of the offence, the lower court proceeded thus: B

“In the instant case, the appellant is not contesting the allegation that there was an armed robbery against the PW2 whereof the money of the PW1 was stolen. *What he challenges is the finding and conclusion of the trial court that he was one of the persons that committed the robbery.* On this *the evidence adduced by the Prosecution tends to show that the appellant was identified by the PW2 as one of the robbers...*”[per Tsamani JCA at page 192; italics supplied] C

ABSENCE OF AN ESSENTIAL ELEMENT OF THE OFFENCE

Counsel for the appellant impugned these concurrent findings D that the PW2 identified the appellant. Was there any evidential justification for the above finding of the lower court? Listen to Tsamani JCA:

“*The appellant was not arrested at the scene of crime. In fact, the circumstances of his arrest is (sic) not disclosed by the record... It is not in doubt that the PW2 had not met the appellant before the day of the incident.* Though she made a statement to the Police at the State CID Owerri wherein she described the appellant, *but that statement was not tendered in evidence, so it is of no evidential value in the resolution of the issue of identity.* Thus, the *only evidence of identification to be considered is exhibit C and the testimony of the witness in court.* I have already found that *there is nothing helpful in exhibit C as regards the evidence of the identity of the appellant.* The PW2 however stated that she was able to identify the appellant at the State CID Owerri. Though the appellant challenges *this process of identification*, the trial court held that considering the evidence before it, identification was not necessary...” [page 196 of the record; italics supplied] F

Pray, what was this process of identification at the State C. I. G D., Owerri, which the appellant was compelled to contest? At page 69 of the record, the following answers were elicited from the PW2 during the cross examination:

Q - At Owerri, the Police *brought out the four accused persons*

and told you that they were the robbers?

A - Police brought out the accused persons and asked me to identify the robbers and I identify (sic) first and fourth accused persons.

Q. It was the Police that arrested them

B A. Yes

[Italics supplied for emphasis]

Against the above background, learned counsel for the appellant pointed out that it was clear that he [appellant] was not arrested at the scene of the crime and, hence, there must be evidence which must identify him to be among the robbers on December 15, 2005, [paragraph 4.21, page 14 of the brief]. True, indeed, the lower court [per Tsamani JCA, at page 199 of the record] observed that the “PW2 did not mention the features of the appellant at the time she made exhibit C,” that is, the statement she made on December 16, 2005, just a day after the alleged robbery incident on December 15, 2005.

My noble lords, the circumstances of this case remind me of the cautionary words of this court in *Ndidi v The State* [2007] 13 NWLR (pt. 1052) 633. As the lower court found, the appellant was not arrested at the scene of crime; PW2, whom the lower court, erroneously, referred to as “the victim”, at the earliest opportunity in exhibit C, did not mention any of his features even as, according to her, he [the appellant] was unmasked. Worse still, at the State C. I. D., Owerri, only the four accused persons were shown to the PW2 for their so-called identification. These circumstances called for caution.

As this court held at page 653 of *Ndidi v The State* (supra) “a trial Judge in Nigeria must not only warn himself but must meticulously examine the evidence proffered to see whether there are any weaknesses capable of endangering or rendering worthless any contention that the accused was sufficiently recognized by the witness.”

Contrary to the above prescription in *Ndidi v The State* (supra), the trial court’s approach to the Prosecution’s evidence was, H irksomely, perfunctory, nay more, lackadaisical! Regrettably, the lower court, inexplicably, steam rolled the appellant’s conviction into its concurrent conclusion of his guilt!

At the risk of repetition, I shall invite His lordship, Tsamani JCA, to speak to the circumstances which should have impelled the

exercise of caution before arriving at the conclusion that the appellant was properly identified, *Ukorah v The State* [1977] 4 SC 167, 171; *Nwabueze v The State* [1988] 4 NWLR (pt. 86) 16, 30-31; *Mbenu v The State* (supra). According to His lordship:

The appellant *was not arrested at the scene of crime*. In fact, *the circumstances of his arrest is (sic) not disclosed by the record. ... It is not in doubt that the PW2 had not met the appellant before the day of the incident*. Though she made a statement to the Police at the State CID Owerri wherein she described the appellant, *but that statement was not tendered in evidence, so it is of no evidential value in the resolution of the issue of identity*. Thus, *the only evidence of identification to be considered is exhibit C and the testimony of the witness in court*. I have already found that *there is nothing helpful in exhibit C as regards the evidence of the identity of the appellant*. [page 196 of the record; italics supplied]

Continuing, Tsamani JCA observed that the “PW2 however stated that she was able to identify the appellant at the State CID Owerri” However, from page 96 of the record, it is unarguable that the PW2’s so-called identification of the appellant at the State C.I.D., Owerri was not an identification parade known to law. According to her, the police “brought out the accused persons and asked her to identify the robbers”

With due respect, what happened at the State C.I.D Owerri, was, at best, a travesty, or, at worst, a mockery of a proper identification parade. *Bozin v the State* [supra]. In a plethora of cases, this court has, most solicitously, explained to the police how to conduct an effective identification of suspects. It is, therefore, very surprising that the sort of charade that took place at the State C.I.D., Owerri, as shown above, could be allowed to dictate the lower court’s concurrent affirmation of the appellant’s guilt, *Ikemson v State* [supra]; *Bozin v State* [supra]; *Mbenu v State* [1988] 3 NWLR [pt 84] 615 etc.

***I am, therefore, constrained to restate the well-known position that, for such an exercise to constitute an identification parade, the Police must assemble a group of persons of identical size and common physical features from whom a witness would, then, be required to identify a suspect or suspects unaided and untutored.*** *Mbenu v The State* (supra); *Obidika v The State* [1977] 2 SC 21; *Orimotoye v The State* [1984] 10 SC 138,

143; *Obiode and Ors v The State* (1971) 1 All NLR 35, 39; *Anyanwu v The State* [1986] 5 NWLR (pt. 43) 612.

Although no two cases can be, exactly, the same, however, what transpired at the State C. I. D, Owerri, bears striking resemblance to what happened in *Abdullahi v The State* [2005] All FWLR (pt 263) 698. In that case, there was no formal identification parade. The *victim* of the armed robbery attack was invited to the police station where the appellants were being held. She came and identified them as those who robbed her on the previous night.

This court was unimpressed with the shoddy job of the Police and intimated that:

*“It is a settled principle under our criminal justice system that where an identification evidence is poor, as in the instant case, the trial court should return a verdict of not guilty unless there is another evidence which goes to show the correctness of such an identification.”* *Otti v State* [1993] 4 NWLR (pt. 290) 675; *Adamu v State* [1991] 4 NWLR (pt. 187) 530; *Chukwuma v State* [1990] 1 NWLR (pt. 463) 686; *Ozaki v State* [1990] 1 NWLR (pt. 124) 92; *Eyisi v State* [2001] FWLR (pt. 35) 750; [2000] 15 NWLR (pt. 691) 555. [page 715 of the report; Italics supplied for emphasis]

Just as in *Alabi v State* (1993) 7 NWLR (part 307) 511 at 537, the answer elicited from the PW2 points to the fact she had a fleeting glance of the accused person. In answer in cross examination, she responded that she did not know the appellant before the robbery and that the robbery lasted for about “*twenty minutes - they did not spend too much time,*” [page 194 of the record].

What is more, such was her state of mind that she “*fell on the ground and urinated,*” page 194 of the record. The question which both the trial court and the lower court failed to consider was whether, having regard to her fleeting contact with the robbers, whether her distressed condition that even induced her to fall down and urinate, conduced to any impediment to a clear identification of the appellant, *Alabi v State* (supra) 537.

Did her condition on the floor facilitate or impede her perception of the robbery incident? See, *Alabi v State*, 537. Why was her statement in exhibit C in which, according Tsamani JCA, “*she described the appellant,*” [page 196 of the record], not tendered? All these hiatuses in the case of the Prosecution called for caution before



the trial court could convict the appellant.

At page 196 of the record, Tsamani JCA found that there was nothing helpful in exhibit C as regards the evidence of the identity of the appellant. Question: by what alchemy did His Lordship arrive at the conclusion that *“the evidence adduced by the Prosecution tends to show that the appellant was identified by the PW2 as one of the robbers...”* [per Tsamani JCA at page 192; italics supplied].

Pray, in the absence of the exhibit C, was there any other evidence which tended to show that the PW2 identified the appellant? According to Tsamani JCA, the *“PW2 however stated that she was able to identify the appellant at the State C. I. D., Owerri.”* The question is: how was this possible? Could what happened at State C. I. D., Owerri, qualify as identification evidence as known to law? Was the above evidence of the identity of the appellant not punctured with impossibilities? Did so many questions not remain unanswered and unexplained?

Should not the trial court have hesitated before arriving at the conclusion that it was satisfied? And, if it was in doubt, (a doubt which any impartial view of the evidence in this case should have induced), was it not its duty to give the benefit of that doubt to the appellant, *Bozin v State* (supra)? On its part, wasn't the lower court under a duty to quash the conviction and sentence of the appellant, since an essential element of the offence was not proved, *Walter William Chadwick and Ors* (1917) 12 Cr App R 247?

My Lords, I am enamoured of, and fascinated by, the following adumbration of the erudite Tom Yakubu JCA in *Eyonaowa v COP* (2014) LPELR -22339 (CA) 39 -40, C-B on this point. I, therefore, take the liberty to adopt His Lordship's most apposite observations that:

*“The identification ... of an accused person and, [hence], his complicity in an alleged offence seems to be the most serious ingredient in proving an offence of armed robbery, because it is the ingredient which creates the link between the act of stealing and the fact that it was an armed robbery. So, the question would always be: who committed the armed robbery?”* [39 -40; C-B; italics supplied]; His Lordship prayed in aid the following decisions *Ndidi v The State* [2007] 5 SCNJ 274, 287 - 288; *Ikemson v The State* [1989] 3 NWLR 455; *Bassey Akpan Archibong v The State* [2006] 14 NWLR

(pt. 1000) 349; *Enesi Lukman Abdullahi v The State* [2008] 5 SCNJ 197; *Sunday Ani v The State* [2009] 6 SCNJ 98.

For the umpteenth time, let me, on behalf of this court, remind the Police that the considerations that govern a proper identification include, inter alia: the description of the accused person given to the police shortly after the commission of the offence; the opportunity the victim had of observing the accused person; and what features of his which the victim noted and communicated to the police as marking him out from others persons, *Ikemson v State* [supra].

**To qualify as an Identification parade, what transpired there must be the identification evidence of a witness who was either the victim of the armed robbery attack or of a witness who was an eye witness to the armed robbery operation. In other words, it must be that evidence which tends to show that the person charged with that offence is the same as the person who was seen by the witness, as committing the said offence.** *Abudu v The State* [1985] 1 NWLR [pt.1] 55; *Mbenu v The State* [1988] 3 NWLR [pt.84] 615; *Ogoala v The State* [1991] 3 SCNJ 61; *Uche-Williams v The State* [1992] 10 SCNJ 74; *Ndidi v The State* [2007] 5 SCNJ 274 287-288

In my humble view, for the reasons adduced above, the trial court should have applied caution in convicting the appellant. On its part, the lower court should not have endorsed that egregious mockery of the identification process, *Olalekan v State* [2001] 18 NWLR (pt 746) 796; *Abudu v State* [1985] 1 NWLR (pt 55; *Ajibade v State* [1987] 1 NWLR (pt 48) 205.

Had the lower court viewed the evidence before the trial court impartially, it would have induced some doubt with regard to the so-called identification of the appellant: doubts, the benefit of which, that court, regrettably, in its affirmation of the trial court's decision, denied the appellant, *Bozin v State* (supra) at 1091; *Bashaya v State* [1998] 4 SCNJ 202; *Chukwu v State* [1996] 7 NWLR (p 63) 686. With profound respect, that was a wrong approach.

**As already pointed above, it is a settled principle, under our criminal justice system, that where an identification evidence is poor, as in the instant case, the trial court should return a verdict of not guilty unless there is another evidence which goes to show the correctness of such an identification.**

*Otti v State* [1993] 4 NWLR (pt. 290) 675; *Adamu v State* [1991] 4 NWLR (pt. 187) 530; *Chukwuma v State* [1990] 1 NWLR (pt. 463) 686; *Ozaki v State* [1990] 1 NWLR (pt. 124) 92; *Eyisi v State* [2001] FWLR (pt. 35) 750; [2000]) 15 NWLR (pt. 691) 555.

In the instant case, as Tsamani JCA pointed out, there was “*nothing helpful in exhibit C as regards the evidence of the identity of the appellant*,” [page 196 of the record; italics supplied], Worse still, as already shown above, what transpired at the State C. I. D., Owerri, was a charade; a farce, *Bozin v The State* (1985) LPELR -799 (SC) 12 -13, F-C!

***In effect, the Prosecution failed to prove one of the essential ingredients of the said offence. This failure meant that a doubt was created in the prosecution’s case: a doubt that should have eventuated to the acquittal and discharge of the appellant.*** *Awosika v State* [2010] 9 NWLR [pt.1198] 49, 72; *Rabiu v State* [2010] 10 NWLR [pt. 1201] 127.

***It cannot be gainsaid that were the prosecution fails to establish all the essential ingredients of the offence charged beyond reasonable doubt, its case would collapse like a pack of cards.*** *Chukwuma v FR.N* [2011] 13 NWLR [pt.1264] 391, 408; *State v Oladotun* [2011] 10 NWLR [pt.1256] 542, 567; *Ochiba v The State* [2011] 17 NWLR [pt. 1277] 663; *Aruma v The State* [1990] 6 NWLR [pt.155] 125,137; *Ameh v The State* [1978] 6-7 SC 27. SUNDY GAPS IN THE PROSECUTION’S CASE

***Counsel for the respondent contended that, since the Prosecution called a total of five witnesses, there was no need calling the Investigating Police Officer [IPO]. True, indeed, It has long been established that the Prosecution need not call all the witnesses to prove its case, and in fact, the choice of witnesses is at its discretion.*** *State v Olatunji* [2003] LPELR - 3227 [SC] 32-33, G-A; *Sunday v State* [2010] 18 NWLR (pt 1224) 223; (2010) LPELR -1470 (SC) 25; *Ogbotu v State* [1987] 1 NSCC 439, 437.

All the same, it must, always, be remembered that the need to call witnesses arises from the onus on party to establish its own side of any given issue, *Onuoha v The State* [1989] 2 NWLR (pt 101) 23, 35 - 36, H -A. In the instant case, the lower court found that the “*appellant was not arrested at the scene. In fact, the circumstances of*

*his arrest is (sic) not disclosed by the record.. ” It is not in doubt that the PW2 had not met the appellant before the day of the incident..., [page 196 of the record; italics supplied].*

**What is more, from the evidence elicited from the said PW2 in cross examination, it is not in doubt that the circumstances of the so-called identification parade were twined in some doubts. As such, the evidence of the IPO [who, presumably, arrested the appellant and, purportedly, conducted the contested identification parade] was very vital as regards the circumstances of the appellant’s arrest and the nature of the said identification parade.**

**Since the prosecution failed to call him as a witness to clear the doubts that engulfed these incidents, the presumption is that his evidence would have been more favourable to the accused person.** *Oshodin v The State* [2001] 12 NWLR (pt. 726) 217.

#### THE VICTIM OF THE OFFENCE

At page 3 of the record, the Prosecution alleged that the appellant and others robbed one Cosmas Azodiro. Put, simply, the Prosecution’s case was that the said Cosmas Azodiro was the victim of the alleged robbery. However, in his evidence -in-chief, PW1, the said Cosmas Azodiro, averred *inter alia*, that:

On 15-12-05 I went to market by 6:30am. I went to Afor-Ogbe market. After slaughtering some cows, I started selling. At 9:30 am -10 am, *my wife called me on phone, she reported that armed robbers came to my house...On getting home .... I demanded to know what happened from my wife and she narrated all that happened to me...* [pp. 60-64 of record; italics supplied for emphasis]

PW2, wife of the PW1, corroborated that sequence in her evidence-in-chief at pages 64 -66 of the record. According to her:

I know PW1, he is my husband. On 15/12/05 I was in our house bathing my baby. I heard a knock on the door. I open (sic) up and saw two young men. I asked what they wanted, they said, they were looking for my husband. *I replied that he had gone to the market.* [Italics supplied]

Those were the pieces of evidence before the trial court on the events of December 15, 2005. Whereas, Cosmas Azodiro was alleged to be the victim of the alleged armed robbery, the evidence

disclosed that he was nowhere near the so-called *locus criminis*. Surprisingly, there was no attempt to amend the charge. Yet, contrary to the specific allegation in the Information that the appellant and others, armed with short guns, robbed the PW1 (an allegation to which they pleaded not guilty), the lower court took the view, mistakenly though, that the PW2 was the victim, page 206 of the record. That cannot be! B

Sequel to the ancient maxim, *Judicis est judicare secundum allegata et probata*, which, simply, means that it is the duty of a Judge to decide according to facts alleged and proved, per Nweze JSC in *Ibrahim v The State* [2015] 3 SCNJ 359, 384, the ingredients of the offence charged must be proved as required by law and to the satisfaction of the court, *Obiakor v. State* (2002) 10 NWLR (pt.776) 612, 627; *Nwokedi v COP* [1977] 3 SC 35, 40; *Ameh v The State* [1973] 7 SC 27; *Kalu v The State* [1988] 4 NWLR (pt 90) 503; *Aruna v The State* [1990] 6 NWLR (pt 155) 125. C D

In the instant case, the appellant and others were alleged to have robbed PW1, meaning that he was the victim of the alleged offence. Somewhat, most curiously, the lower court [per Tsamani JCA], just as the trial court, inexplicably, refused to focalise the experience of the alleged victim as a crucial or indispensable adjunct in the definition of robbery. E

With profound respect, that incongruous and absurd approach betrayed Their Lordships' misconception of the nature of the offence in question. Contrariwise, it is the experience of the victim, embodied in the fear and intimidation which eventuates from the dread of potential aggression to his person prior to the robbery, that defines the offence of robbery. F

It is against this background that I, entirely, endorse the contribution of Tobi JSC in *Fatai Olayinka v The State* 30 NSCQR 149, 172- 173, Tobi JSC that: G

What makes an offence under the Act, in which the accused persons are charged, one of the armed robbery is the use of firearms as offensive weapon. Now the proof of corpus delict (sic) in an armed robbery case consist (sic) of proof that property has been fraudulently taken *by an assault or by putting the fear of life or bodily injury into the victim*. It may be proved by both direct and circumstantial evidence. *For an act to constitute robbery there must be that experi-* H

ence by the victim of fear and intimidation brought about by apprehension of possible violence to (sic) person before the robbery. The fear of possible injury instilled on the victim must of necessity precede the taking. I believe that intimidation or constructive force by which what is commonly described as fear of God is put in a person and in which a crime of robbery is committed shall include all administration of force or menace and other means by which the victim is put in fear sufficient to sustain at the material time free exercise of his will power as to make it awfully difficult or near impossible for him to offer any resistance to anyone taking his property. [Italics supplied for emphasis]

The point being made here is not that the assailants should have perpetrated or inflicted violence on the victim. The main consideration is the threat of the use of violence if only such a threat conduced to fear in the mind of the victim that noncompliance would impel the infliction of violence on him, *Otti v State* [1991] 8 NWLR (pt. 207) 103, 118; *Nwomukoro v The State* [1995] 1 NWLR (pt. 372) 432, 443; *Ajiloye v State* [1983] 6 SC 1; *Okobi v State* [1990] 6 NWLR (pt 155) 125.

As shown above, in this case, the victim, according to the charge before the trial court, was the PW1. However, from the testimonies of PW1 and PW2, it is not in doubt that he was nowhere near the *locus criminis* on the fateful day.

**There is another feature of the judgments of the lower courts which, invariably, incommoded the constitutional presumption in favour of the appellant. As the appellant's counsel pointed out [paragraph 3. 21, page 7 of the brief], the appellant's defence of alibi, which he raised at the earliest opportunity on December 18, 2005, was not considered at all. Worse still, the Police would seem not to have investigated it all.**

**These two missteps epitomized the failure of justice or the misapplication of justice. On the one hand, having raised the said defence of alibi at the earliest opportunity. *Hassan v The State* [2001] 6 NWLR (pt 709) 286. In his said statement, the appellant had availed the Prosecution of the opportunity either to confirm or confute its availability to him. *Ibrahim v The State* [1991] 4 NWLR (pt 186) 399; *Nwabueze v The State* [1988] 3**

NWLR (pt 86); *Ikemson v The State* [1989] 3 NWLR (pt 110) 455.

**In other words, he cast a burden on the Prosecution to investigate it** *Eyisi v State* [2000] 4 NSCQR 60 **and to disprove same.** *Eke v The State* (2011) LPELR - 1133 (SC) 16.

**As the said defence was not investigated, he was entitled to an acquittal,** *Yanor v The State* (1965) ANLR (Reprint) B 199; *Bello v. Police* [1956] SCNLR 113; *Odu and Anor v The State* [2001] 5 SCNJ 115, 120; [2001] 10 NWLR (pt. 772) 668 **and not the conviction which the trial court slammed against him.**

**On the other hand, I, entirely, endorse the submission of the appellant's counsel that, no matter how flimsy that defence was, the lower courts ought to have considered it.** *Nijjav The State* [1993] 3 SCNJ 28, 35; *Oladipupo v The State* [1993] 6 SCNJ 233, 230 - 247; *Adelenwa v The State* [1972] 7 NSCC 591, 594; *Ulebaka v The State* [2011] 4 NWLR (pt 1237) 358; *Eke v D The State* [2011] 3 NWLR (pt 1235) 589.

**In effect, the trial court's verdict, affirmed by the lower court, amounted to a miscarriage of justice as it was, wholly, prejudicial to the appellant's substantive right.** *Onagoruwa v The State* [1993] 7 NWLR (pt 303) 49; *Joshua v The State* [2000] 5 E 1 NWLR (pt 658) 591; *Sanusi v Ameyogun* [1992] 4 NWLR (pt 237) 527; *Pam and Anor v Mohammed and Anor* (2008) LPELR - 2895 (SC) 74, B - E; *Larmie v DPM and S Ltd (2005)* LPELR-1756 (SC) 24-25, G-B.

**That would, thus, be a ground for interfering with the concurrent findings of the lower courts.** *Adekoya v The State* (2012) LPELR -7815 (SC) 35-36, G-D; *Ogbu v. State* [1992] 8 NWLR (pt. 259) 255; *Cameroun Airline v Otutuizu* [2011] 1-2 SC (pt 111) 200.

BURDEN ON THE PROSECUTION

**The lower court made heavy weather of the fact that the appellant did not testify but opted to make a No Case submission. This is non-sequitur. Unarguably, the prosecution may still fail if the accused person does not utter a word in his defence if the ingredients of the offence are not proved beyond reasonable doubt.** *Yongo v CO.P.* [1992] 8 NWLR (pt.257) 36; [1992] 4 SCNJ 113; *Alor v The State* [1997] 4 NWLR (pt 501) 511; *Kim v State* [1992] 4 NWLR (pt. 233) 17; *Woolmington v*

*DPP* (1935) AC 462; *Igabele v. State* [2006] 6 NWLR (pt. 975) 100; *Ikaria v The State* (2012) LPELR -15533 (SC).

***This is an offshoot of the prescription that in criminal cases, the burden of proof remains on the prosecution throughout and does not shift to the accused person, except in a few***

***limited circumstances, such as where an accused person raises a defence of insanity.*** *State v Emine* [1992] 7 NWLR (pt. 256) 658; *Ogundiyan v State* [1991] 3 NWLR (pt. 181) 519; [1991] 4 SCNJ 44; *Alonge v IGP* (1959) 4 FSC 203; [1959] SCNLR 516.

This notion of the Prosecution's burden derives from our accusatorial criminal justice system. Under it, in contradistinction to the inquisitorial system, it is anathematic to expect an accused person to purge himself of guilt. This must be so since the fundamental law of the country, the Constitution, [section 36 (5) thereof], avails him of the presumption of innocence until proven otherwise, *Uso v C. O.P.* [1972] NSCC 631; *Kinnami v. Bauchi Native Authority* (1957) NRNL 42, approvingly, adopted in *Ani and Anor v The State* (2009) LPELR -488 (SC) 14 -15, D-E.

This is, actually, a fundamental principle of most commonwealth penal laws, often couched in the ancient maxim *in dubio pro reo* - a principle which has been interpreted as imposing the burden of proving the guilt of an accused person on the prosecution, *Obiakor v. State* (2002) 10 NWLR (pt. 776) 612; *Bello v State* (2007) 10 NWLR (pt. 1043) 564, 585 *Oladele v. Nigerian Army* (2004) 6 NWLR (pt. 868) 166.

In my humble view, from the totality of the evidence of the Prosecution, a reasonable doubt was created as to whether the Prosecution's witness, PW2, proved the identity of the appellant as one of those who perpetrated the alleged act of robbery as laid in the Information. In effect, an essential ingredient of the offence was not proved, *Obiakor v. State* (supra) 627; *Nwokedi v COP* (supra) 40; *Ameh v. State* (supra); *Kalu v State* (supra); *Aruna v State* (supra).

Against this background, the Prosecution must be deemed to have failed to discharge the burden of proof which the law cast upon it: a failure which entitled the appellant to a discharge and acquittal, *Alonge v Inspector General of Police* [1959] SCNLR 576; *Fatoyimbo v Attorney General Western Nigeria* (1966) WNLR 4; *State v Danjuma* [1997] 5 NWLR (pt. 506) 512.



In the words of Aniagolu JSC in *Nwosu v The State* [1986] 4 NWLR (pt 35) 348, 359, the concurrent judgements of the trial court [Duroha- Igwe J] and the lower court [per Tsamani JCA] would appear to have been founded on “*scraggy reasoning*,” also, *Ndidi v The State* (supra) 657 -658. They must, therefore, not be allowed to stand as they constitute great affronts to the constitutional presumption of innocence in favour of the appellant. B

In consequence of all I have said above, I find that this appeal must be, and is hereby, allowed. I hereby enter an order setting aside the judgement of the lower court dated July 6, 2012, which affirmed the trial court’s conviction of, and sentence on, the appellant on September 23, 2009. C

In lieu thereof, I order the immediate release of the appellant from the custody of the Prison authorities. That shall be the judgement of this court. Appeal allowed. Judgement of the lower court, affirming the trial court’s judgement, quashed as prayed. Appellant is, hereby, acquitted and discharged, accordingly. D

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### MUHAMMAD JSC

I read in advance, the judgment of my learned brother, Nweze, JSC, just delivered. I agree with his reasoning and conclusion for allowing the appeal. I, too, allow the appeal. I abide by consequential orders made in the lead judgment. E

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### NGWUTA JSC

I read in its draft form the lead judgment of my learned brother, Nweze, JSC. I agree with the illuminating reasoning leading to the conclusion that the appeal is meritorious and that the appellant ought to be acquitted and discharged. G

Notwithstanding the risk of repeating what has already been dealt with in the lead judgment I will add a few words.

The alleged victim of each of the two offences in the indictment is one Cosmas Azodire who testified as PW1 in the trial Court. By his evidence he was not at the scene when the robbery took place, but his wife gave him an account of what happened. It follows that the evidence led by the prosecution in proof of the victim of the H

offences is at variance with the charge. PW1 cannot be a victim of armed robbery in the absence of evidence to show who was robbed, the prosecution cannot be said to have proved the elements of offence beyond reasonable doubt. See *Obue v. The State* (1976) 2 SC 141; *Ume v. The State* (1973) 2 SC 9. See also Section 135 (1) of the Evidence Act 2011.

As if a fatal blow had not been struck at the prosecution's case, the identification of the appellant as one of the armed robbers is a farce, a sham. He was arrested by the Police, but not at the locus criminis. PW2 who was at the scene at the material time and ipso facto in a position to identify the appellant said, under cross-examination that: "Police brought out the accused persons and asked me to identify the robbers ...".

That, in my view, amounts to working from the answer to the problem as it were. A conviction of the appellant on the basis of PW2's evidence of identification is a travesty of justice. There should have been a proper identification parade to see if the witness could identify the appellant in the midst of other people of similar body proportions and in view of the fact that there may be honest but mistaken identification resulting from error of observation or recollection or both the Court should be guided by the preponderance of possibilities on one side or the other in the quest for justice. See *Ugwumba v. The State* (1993) 7 KLR 190; *Madagwa v. The State* (1987) 4 NWLR (Pt. 64) 172; *Alabi v. The State* (1993) 10 KLR 147.

On the facts of this case, it is my view that the prosecution ought to have called the Investigating Police Officer who asked the PW2 to identify the alleged robbers to the stand. The evidence he would have given exists and there was no reason for not calling him. This raises the (sic) evidence of the IPO would have been unfavourable to the prosecution's case if he had been called to give it.

As aptly demonstrated in the lead judgment, there is enough perversity in the findings of facts upon which the judgments of the Courts below were based for this Court to disturb the said judgments. See *Njoku & ors v. Eme & ors* (1973) 5 SC 293 at 306; *Kale v. Coker* (1982) 12 SC 252 at 271; *Enang v. Adu* (1981) 10-12 SC 25 at 42.

For the above and the more comprehensive reasoning in the lead judgment I also allow the appeal, vacate the judgment of the Court below which affirmed the judgment of the trial Court and en-

ter an order acquitting and discharging the appellant. Appeal allowed.

### **AKA' AHS JSC**

In this appeal, the issue is whether the offence of armed robbery can be proved where the supposed victim of the robbery was not present at the scene of the crime. The substance of the two count charge against the appellant (who was the 1st accused) and three others was that on 15<sup>th</sup> December, 2005 at Umuduruji Elekenaowari Obobia Ahiazu, Mbaise in the Aboh, Mbaise Judicial Division conspired among themselves to rob with guns one Cosmas Azodiro of the sum of N1,827,000.00 (One Million, Eight Hundred and Twenty Seven Thousand Naira) belonging to him and while armed with short guns robbed the said Cosmas Azodiro of the sum of N1,827,000.00 (One Million, Eight Hundred and twenty Seven thousand Naira). Although the money belonged to the said Cosmas Azodiro who testified as PW1, the victim of the robbery was PW2 (Assumpta Azodiro) the wife of PW1. The robbery took place when PW1 had gone off to the market, leaving PW2 with a little baby at home and when the robbers arrived they enquired about PW1. PW2 told them he had gone to the market. The robbers pretended they wanted to buy a cow and she told them to go to Afor Ogbe market. Thereafter one of the robbers brought out a gun accusing PW1 of being a thief. Another of the robbers also brought out his gun and told her not to move. She then started to beg. The robbers ordered her to go and show them her husband's room. She took them to the room and they searched the room and discovered a travelling bag containing a huge amount of money. The robbers brought out the bag and as she was about to shout one of the robbers pointed a gun at her. After the robbers had left she called PW1 to inform him about what had happened.

With this eye witness account given by PW2, there is no doubt that robbery had been committed in the residence of PW1 but was PW1 the actual victim of the robbery? PW1 was not at home when the robbers entered the house and forced PW2 at gun point to show them PW1's room. For an act to constitute robbery, there must be that experience by the victim of fear and intimidation brought about by apprehension of possible violence to his person before the rob-

bery. The fear of possible injury instilled on the victim must of necessity precede the taking. See: *Ajiloye v. State* (1983) 6 SC II; *Okobi v. State* (1990) 6 NWLR (Pt. 155) 125; *Otti v. State* (1991) 8 NWLR (Pt. 207) 103 at 118. It was PW2 who was at the scene of the robbery. She and not PW1 saw the robbers and they threatened her with violence. If the charge had been framed to state that the robbery had been committed in the residence of Mr. and Mrs. Cosmas Azodiro in which the robbers made away with N1,827,000.00 belonging to PW1 the charge would have stuck.

Quite aside the fact that the victim of the robbery was PW2 and not PW1, the appellant set up an alibi which was not investigated. This coupled with the poor identification of the appellant by the Police rendered the conviction of the appellant unsupportable. The lower court ought to have overturned the conviction.

For this and the more comprehensive treatment of the appeal by my learned brother, Nweze JSC, the judgement of which I had the opportunity to read before now, I too find merit in the appeal and it is allowed. The conviction of the appellant by the trial High Court of Imo State is hereby quashed and the appellant is acquitted and discharged.

I wish to observe that the Police must be meticulous with their investigation and not engage in sloppiness which will lead to criminals getting off the hook because of tardiness in carrying out their primary function of investigation and prevention of crime.

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### **SANUSI JSC**

I read before now the draft of the judgment delivered by my noble lord CHIMA CENTUS NWEZE JSC. His lordship had dealt thoroughly with all the salient issues canvassed by learned counsel for the parties. I am in entire agreement with his reasoning and the conclusion he arrived at that this appeal is meritorious and should be allowed.

I accordingly allow the appeal and set aside the judgment of the court below which had earlier affirmed the decision of the trial court. I endorse the consequential order made in the leading judgment.